Supreme Court, U.S.
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No. 01-463

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

FIOR D'ITALIA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether judicial deference is owed to an enforcement position of four renegade IRS offices, contrary to the express directive of the IRS National Office, whereby an employer is assessed its share of FICA taxes on the tips its employees receive on the basis of an estimate of aggregate unreported tip income of all unidentified employees of the employer collectively, without regard to statutory wage exclusions available to all other employers, for the purpose of financing social security generally, in the absence of statutory, regulatory, or *any* agency interpretive authority whatsoever.

CORPORATE DISCLOSURE STATEMENT

Respondent, Fior d'Italia, Inc. has no parent corporations and there are no publicly held companies that own 10% or more of the taxpayer's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI 1

STATUTORY PROVISIONS AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 8

1. Uniformity and Disparate Treatment 8

2. Employment Tax Statutes 9

3. Aggregate Assessments 13

4. The Necessity for Review 16

CONCLUSION 17

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Labor Commissioner of California v. Specialty Restaurants Corp., No. AP-11668 of the Appellate Division Superior Court of California, County of Orange, Feb. 20, 2001 6

STATUTES AND REGULATIONS:

Federal Insurance Contributions Act, 26 U.S.C. 3101 *et seq.*:

26 U.S.C. 3101 ..... 1, 10

26 U.S.C. 3102 1

26 U.S.C. 3102(c) 2, 12

26 U.S.C. 3111 10

26 U.S.C. 3121(a) 10, 11

26 U.S.C. 3121(a)(1) 6, 11

26 U.S.C. 3121(a)(12) 1, 6

26 U.S.C. 3121(b) 1, 10, 11

26 U.S.C. 3121(q) 5, 10, 11

26 U.S.C. 3402(k) 2

Internal Revenue Code: (26 U.S.C.):

§ 45B 1, 6, 15

§ 6053(a) 1, 2

§ 6201 ..... 13, 14

§ 6652(b) 2

TABLE OF AUTHORITIES – Continued

Page

26 C.F.R.:

Section 31.3121(q)-1(c) 2

Section 31.3402(k)-1(a)-(c) 3

Section 31.6011(a)-1 4

Section 31.6053-1(a)-(c) 2

Section 31.6053-3 4

Section 31.6071(a)-1 4

Section 31.6302-1 4

MISCELLANEOUS:

H.R.Conf. Rep. No. 760, 97th Cong., 2d Sess. 556-8, reprinted in 1982 U.S. Code Cong. & Ad. News 1328-30 4

Tip Income Study: A Study of Tipping Practices in the Food Service Industry for 1984, Department of Treasury, Internal Revenue Service, Research Division, Publication 1530 (8-90) Catalog No. 12482K7 ..... 8, 14, 15

Wage and Hour Field Operations Handbook ¶ 30d05(a) 6

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Fior d'Italia, through its attorneys, opposes the petition for writ of certiorari of the United States to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The petitioner has failed to promulgate any relevant regulations. In addition to the statutory provisions identified by petitioner, the relevant portions of Sections 45B, 3101, 3102, 3121(a)(12), and 3121(b), of the Internal Revenue Code, 26 U.S.C. 45B, 3101, 3102, 3121(a)(12), and 3121(b) are set forth in the Appendix, infra, 1-6.

STATEMENT OF THE CASE

Respondent disagrees with petitioner's statement of the case in a number of respects.

Respondent intimates at pages 2-3 of its petition that employees fail to declare their tip income and employers ignore blatant underreporting in accounting for their FICA tax on tip obligations. Neither is the case. Petitioner simply misunderstands the mechanics of reporting and accounting for tip income.

Employees are required to report the tips they retain to their employers by the tenth day of the month following the month in which they are earned. 26 U.S.C.

6053(a); 26 C.F.R. 31.6053-1(a)-(c); 26 C.F.R. 31.3121(q)-1(c). Since tips are most often given to employees directly from customers and split with indirectly tipped employees (e.g., hostess, busboys, bartenders, bread girls, etc.) in varying amounts at the discretion of the directly tipped employees, employee reporting is the only way for an *employer* to know the amount of tips retained by individual employees.

Section 6053(a) is not the only means by which an employee may declare his tipped income however. An employee may declare his tips directly on his income tax return through the use of Form 4137, a form specifically designed for this purpose. There is no penalty for an employee's failure to report his tips to the employer and instead report his tip income directly to IRS on his tax return by use of Form 4137 as long as his failure is due to reasonable cause and not wilful neglect. 26 U.S.C. 6652(b). There are many legitimate, logical, practical, and lawful reasons why an employee may not report all his tips to the employer pursuant to 6053(a), yet still declare them for income tax purposes on Form 4137 when filing his income tax return.

The restaurant business is a very transient business with employee turnover rates of 200-400%. Many employees cease working for the employer long before the time to report even rolls around – certainly a legitimate reason for not reporting to the, now ex-, employer.

Reporting is often of no consequence to an employee's withholding. An employer can only withhold the employee's taxes from the funds (i.e., cash wages) within his control. 26 U.S.C. 3102(c), 3402(k); 26 C.F.R.

31.3402(k)-1(a)-(c). If an employee makes $10 per hour in tips and is paid cash wages of $2.13 per hour by the employer, the taxes on the tips will be greater than the funds available from which to deduct them, resulting in a "negative paycheck." Negative paychecks are *de rigueur* in the industry with many employees receiving their first of 52 negative paychecks the first week of the year. Under such circumstances the employee must provide a year end reconciliation of all tip income and make a lump sum payment of taxes due when filing his tax return in any event. Reporting additional amounts to his employer will not relieve him of this requirement which, as a practical matter, hardly provides the incentive for accuracy in reporting to his employer which IRS demands.

There are also many reasons an employee may not want the employer to know the total amount of tips retained. An employee may be afraid that if the employer knows the total amount of tips he receives, the employer may reduce his station or hours in favor of other employees, thereby reducing his income. A directly tipped employee may share a substantial portion of his tips with a hostess in return for seating the better tipping customers in his section or with a chef for giving his favored customers the best cut of meat – practices which neither the directly nor indirectly tipped employee would be keen about the employer discovering.

For these reasons and many others there would be nothing unusual in the total amount of tips reported by employees to employers being less than total credit card tips or less than expected. Nor would such "underreporting" mean that the tips were not declared by individual

employees on their income tax returns. It is sheer speculation to suggest that less than expected reporting of tips by employees to their employers means that there is "blatant underreporting" or even any failure to declare tip income at all.

It is also misleading to suggest that the employer turns a blind eye to "blatant underreporting" as disclosed on Form 8027 when accounting for his FICA tax on tip obligations. Form 8027 has nothing to do with the deposits of or accounting for FICA taxes on tips. Form 8027 is an informational return filed, *after the close of each year*, by which the employer reports to the IRS his gross receipts, credit card receipts, credit card tips, tips reported by employees and the shortfall between total tips reported and 8% of receipts, allocated among identified employees, in order to assist IRS in doing *its* job of examining the income of tipped employees. 26 C.F.R. 31.6053-3; H.R.Conf. Rep. No. 760, 97th Cong., 2d Sess. 556-8, reprinted in 1982 U.S. Code Cong. & Ad. News 1328-30.

An employer's FICA taxes on wages paid and tips "deemed paid" by virtue of an employee's reporting to the employer, on the other hand, are deposited on a daily, semi-weekly, or monthly basis depending on the size of the employer's payroll, 26 C.F.R. 31.6302-1, and accounted for on a quarterly basis, 26 C.F.R. 31.6011(a)-1, and 31.6071(a)-1, *continuously throughout the year*, i.e., long before the information on Form 8027, which petitioner argues makes "blatant underreporting" obvious, is known or available. Form 8027, due annually on February 28, is completed after payroll tax deposits are made, quarterly payroll tax returns are filed, and even

employees' W-2's showing total tips reported throughout the year, are finalized and sent to employees and filed with IRS and the social security administration. It is silly to suggest that the employer ignores blatant underreporting in his near daily payroll tax obligations when the information he is accused of ignoring will not be available for many months after the fact.

The only information available to the employer and indeed the only information upon which the law allows him to rely in fulfilling his FICA tax obligations on tip income on a payroll by payroll basis during the course of the year, is the reports of such income by individual employees. Petitioner's specious suggestion that the employer has any option, either practically or legally, but to base his FICA tax on tips obligations on anything but individual employee tip reports is an untenable ruse designed to make the restaurant employer appear scofflaw. He is not.

Petitioner also argues that respondent did not dispute the reasonableness or accuracy of the Service's calculation of the amount of unreported tips. One wonders how we find ourselves at the court house door if such was the case.

Respondent agrees only that IRS's calculation of tip income unreported by employees in the aggregate was reasonable. However that says nothing about the amount of tax an employer owes on the unreported tip income, if any, of his employees pursuant to 26 U.S.C. 3121(q).

There is no way to determine under IRS's aggregate calculation how much, if any, of the aggregate unreported tip income was tip income received by an individual

employee amounting to less than $20.00 a month, 26 U.S.C. 3121(a)(12), nor how much of the aggregate unreported tip estimates by IRS was received by individual employees which when added to such individual employee's other wages paid by the employer exceeded the wage base, 26 U.S.C. 3121(a)(1), nor how much of the IRS aggregate unreported tip estimate was received by individual employees in excess of the federal minimum wage for which the employer is entitled to a tax credit as provided under 26 U.S.C. 45B.

Nor would such a method tell one whether individual employees received tips net of credit card fees often charged by many employers[1] or whether employees received any tips on "employee meals" or "carry-out" sales, figures often included in a restaurant's gross receipts but upon which tips are seldom received. Nor would such a methodology provide information about a company's policy with respect to "walk-outs" or "stiffs"

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[1] Petitioner argues at page 16 that California statutes expressly prohibit this practice and that this "flaw" in the IRS's methodology was of the court of appeals own conjecture. Petitioner is in error. The cited statute is new and became effective after the Ninth Circuit's decision. Prior to the changes in the law, and during the years in issue in this proceeding, a California employer was permitted to subtract the amount of the fee charged by credit card companies from an employee's tips. *Labor Commissioner of California v. Specialty Restaurants Corp.*, No. AP-11668 of the Appellate Division Superior Court of California, County of Orange, Feb. 20, 2001; Case No 99CL 002828, 99CL 004461, Superior Court of the State of California For the County of Orange, Central Justice Center, Nov. 18, 1999. This procedure is also permitted under the Fair Labor Standards Act. Wage and Hour Field Operations Handbook ¶ 30d05(a).

figures often included in gross receipts for financial purposes then expensed, but upon which tipping is unlikely. Nor would an aggregate assessment based on Form 8027 data give any information as to whether a portion of a restaurant's sales are self-service or buffet at different times of the day, factors which would vastly affect the tip rate.

To make a reasonable estimate in the aggregate for all employees is not to make a reasonable estimate of the unreported tips upon which the employer tax may be lawfully assessed. Taxpayer's concession is not an admission that any employer FICA taxes are due, or that all, or even part, of aggregate unreported tips as determined by IRS, were not reported directly to IRS by some employees or that some of those aggregate tips were not wages subject to employer FICA taxes because they amounted to less than $20.00 a month or exceed the social security wage base, when added to the cash wages of individual employees.

Petitioner also states that respondent insists that IRS base its assessment on employers on audits of individual employees. Respondent has never advanced such an argument. It is not necessary that IRS audit individual employees as the Ninth Circuit recognized. Petitioner's App. 13a n.10.

Certainly IRS could collect a substantial amount of its alleged shortfall by simply sending employers a bill for their share of FICA taxes on the additional tips their employees report on Forms 4137 (see infra pg. 2-3). Additional amounts could also readily be collected by pursuing by letter, the list of employees provided IRS annually

to whom an allocation was made, as intended by Congress (see infra pg 4). To the extent perceived additional unreported amounts warrant further pursuit, "desk" audits could be undertaken by sending the identified employees computer generated assessments for amounts in excess of the allocation.

All of these options are available to IRS at minimal time and expense with the crucial distinction of identifying individual employees and amounts of any additional tip earnings of individual employees so their wage earnings records for social security benefit purposes could be credited for such additional amounts with greater assurances that the amounts assessed were actually received by the individual employees.

What's so hard about that?

REASONS WHY THE PETITION SHOULD BE DENIED

1. Uniformity and Disparate Treatment

Petitioner argues that "Resolution of this conflict by this Court is needed to preserve uniform application of the FICA tax throughout the Nation and to avoid disparate treatment of similarly situated taxpayers based solely upon the happenstance of their geographical location." Petition pg. 6.

Certainly the authority to send every restaurant employer in the country a bill for additional FICA taxes on tips on the basis of a determination that tipped employees nationwide earn an average of 12.5% of sales (See, *Tip Income Study: A Study of Tipping Practices in the*

Food Service Industry for 1984, Department of Treasury, Internal Revenue Service, Research Division, Publication 1530 (8-90) Catalog No. 12482K7) with the onus on the employer to prove otherwise, would greatly reduce IRS administrative burden while ensuring that everyone pays on *exactly* the same basis. Although it remains to be seen, even respondent does not fathom that this is what the IRS has in mind.

Rather, it would appear petitioner seeks the authority to unleash thousands of untrained IRS agents, wholly unfamiliar with the nuances of vastly varying restaurant operations and tipping practices and procedures, on the hundreds of thousands of restaurants across the country in order to *ensure* that the determination of individual restaurant employers' FICA tax on tips obligations are made on the basis of uniform consistent principles and application of the tax laws, even though no guidance whatsoever as to how that determination is to be made is anywhere to be found. It is hard to imagine what could lead to greater disparate treatment than that.

If IRS wishes to ensure uniformity and eliminate disparate tax treatment it should do exactly what the Ninth Circuit suggested – promulgate regulations – rather than seek nationwide endorsement of a misguided, indefensible, enforcement methodology developed at the whim of a few rogue revenue agents.

2. Employment Tax Statutes

Petitioner argues that the fact that there is a separate tax on employees and employers, which can be collected at different times, and the fact that the employer owes

taxes on all tips received not just reported, provides statutory authority for an aggregate assessment of all employees of the employer collectively. Such a quantum leap stretches statutory construction analysis beyond its limits.

Both the employer and employee owe FICA taxes on exactly the same thing: tips received by an individual employee whether reported to the employer or not. 26 U.S.C. 3101, imposing the employee tax, and 26 U.S.C. 3111, imposing the employer tax, define "wages" with respect to "employment" subject to both taxes by reference to the exact same definitional sections: 26 U.S.C. 3121(a) and (b). Petitioner would have this court believe that these sections define wages for the employer's share of taxes differently from the employee's share, to wit, "all wages from employment." Petitioner would like this court to construe such language as "*all* remuneration from employment of *all* employees *collectively*." But petitioner fails to quote the relevant portions of the statute.

The tax is imposed "on the income of every ***individual***" under 3101 and on the "wages . . . paid by [the employer] with respect to . . . [the] service . . . performed . . . by ***an employee*** . . . in the course of ***his*** employment" (26 U.S.C. 3111, 3121(b) and (q), emphasis added).

Specifically, 26 U.S.C. 3111(a) and (b) provides:

> . . . there is hereby imposed on every employer an excise tax, with respect to having *individuals* in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) – . . . .

26 U.S.C. 3121(a) defines "wages" as "all remuneration for employment" except for 21 enumerated statutory exceptions. 26 U.S.C. 3121(b) defines "employment" as "any service, of whatever nature, performed . . . by *an* employee for the person employing him".

26 U.S.C. 3121(q) defines "tips received by *an* employee in the course of *his* employment shall be considered remuneration for such employment" (emphasis added).

Thus, this clear statutory language provides that tips received by *an* employee are remuneration, which after being adjusted by the statutory exclusions from remuneration (which *must* be computed on the basis of individual earnings, see 26 U.S.C. 3121(a)(1)-(21)), are considered wages for purposes of the imposition of both the employer's and employee's FICA taxes. Only after an employee's "wages" have been computed and all exclusions from the definition of wages (which the IRS interpretation eliminated) have been accounted for, can the "wages" be subjected to FICA for both employer and employee purposes.

Petitioner makes much of the fact that employers owe taxes when employees fail to accurately report their tips to the employer and that under such circumstances the employer owes its share of taxes at a later date. Petitioner's argument is that this fact somehow redefines what the employer owes. According to petitioner, if employees report the tips to the employer, the employer owes FICA taxes on the tips received by individual employees; if the employee fails to report the tips however, the employer's obligations are somehow redefined

to apply to all tips of all employees in the aggregate as estimated by IRS. Petitioner reads too much into the provision.

The reason why the employer owes the tax on tips received, but unreported to him by employees, at a later date is simple: the employer can't be liable for what he does not know exists until he knows that it exists.

The payment of wages triggers a plethora of procedural and record keeping obligations. Tips are "deemed" paid when reported. Once wages are "paid," tax deposits are required, quarterly forms must be filed, interest, penalties and the statute of limitations kicks in, etc. If the received but unreported tips were "deemed" paid when the reports were due, an employer would be subject to deposit and reporting obligations and all ensuing penalties for failure to satisfy obligations which he does not know, and cannot know, exist. Obviously the unreported and unknown tips cannot be "deemed" paid, thereby setting in motion an employer's FICA system responsibilities, until he has some clue that they even exist.

Language which prevents such a scenario can hardly be read as permitting IRS to ignore all statutory exclusions from income and allowing aggregate assessments of all employees collectively however.[2] There simply is no

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[2] Similarly, petitioner's reference to 26 U.S.C. 3102(c) is nonsensical. Of course a provision which addresses "negative paycheck" situations and clarifies that the employer is not responsible for satisfying an employee's income tax obligations from his own funds when the cash wages owed to the employee

statutory authority for IRS's position. It strains credibility to suggest that there is and no court has so held.

3. Aggregate Assessments

Petitioner argues that there is no authority for the court's holding that aggregate assessments are impermissible, that nothing in the statute requires the IRS to make individual determinations, and that IRS's general authority under 26 U.S.C. 6201 provides it with the right to make aggregate assessments of the income of all employees collectively. In short, petitioner argues that since no statute specifically prohibits assessing on the basis of aggregate estimates, it can. Taken to its logical conclusion, if Petitioner's argument were sound, IRS could, of course, forgo individual audits altogether and apply the same rationale to the collection of all taxes. However, petitioner's argument turns IRS's authority on its head.

Petitioner argues that the court of appeals can cite no authority for its conclusion that IRS *has* no authority. What a fatuous contention! Obviously IRS only has the authority specifically granted to it by Congress. If it was never granted it is not there to be found.

Petitioner nonetheless argues that IRS's authority is implicit in 26 U.S.C. 6201. Ironically, it is this very section upon which IRS bottoms its authority which clearly and unequivocally denies it. Once again petitioner fails to

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are inadequate to cover the employee's withholding obligations, would be totally irrelevant in the context of the payment of the *employer's* share of FICA taxes.

inform this Court of the relevant statutory provisions. 26 U.S.C. 6201 provides: "The Secretary is authorized ***and required*** to make the inquiries, determinations, and assessments of all taxes. . . . " The section may *broadly* "authorize" IRS to choose a reasonable method but there is no questions it also *specifically, "requires"* IRS to make the *very same* inquiries and determinations that IRS *insists* there is no authority to require it to do here.

IRS whines that it has no recourse but to do aggregate assessments because "accurate and complete records showing the amount of tips do not exist". IRS wouldn't know one way or the other and certainly has many far more palatable options available than the one chosen here (see infra pg. 7-8).

Petitioner argues there is no difference between an assessment based upon an aggregate estimate and one on individual audits because an aggregate assessment is nothing more than the sum of individual assessments. Any perceived differences, petitioner continues, are conjecture and in any event may be challenged by the taxpayer.

Make no mistake; respondent's complaints are no canard.

As set forth above and for the reasons set forth in excruciating detail in IRS study of tipping practices (see *Tip Income Study*, supra.), "flaws" permeate IRS's aggregate estimating methodology and are of such a nature that the employer is wholly without the information (which he was not privy to in the first place) to challenge them.

The difference between an assessment issued directly from an IRS agent's desk to a 1000 unit restaurant chain for its employer share of FICA taxes on the basis of an aggregate estimate of unreported tips of all of the company's hundreds of thousands of employees over the last 13 years collectively, without any information with which to mount a defense or determine individual tips earnings, and an assessment based upon the determinations of individual tips earnings, is astronomical by anyone's definition.

Yet petitioner argues that Congress gave tacit approval to the possibility of just such an assessment in 1998 when enacting restrictions on IRS's promotion of TRAC agreements. Such an inference is not only flatly contradicted by Congress's action only months earlier with regard to changes to 26 U.S.C. 45B (see petitioner's App. 17a and 46a-50a) but an implausible inference in light of the fact that employer-only assessments based on aggregate estimates were prohibited by IRS National Office at the time Congress was considering and enacted its restriction on the promotion of TRAC agreements.[3]

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[3] In a memo from Thomas J. Smith, Assistant Commissioner (Exam), to IRS Regional Chief Compliance Officers dated December 11, 1996, the field was notified:

> We can no longer have employer-only assessments. Any assessments made should be based on amounts from either Form 4137, *Social Security and Medicare Tax on Unreported Tip Income* (filed by the employee with the employee's Form 1040) or amounts reflected on Form 885-T, *Adjustment of Social Security Tax on Tip Income Not Reported to Employer*, prepared at the conclusion of an employee tip examination.

IRS aggregate assessments are flawed and authorized by neither statute nor administrative policy. Not only does IRS have viable alternatives, pursuing such alternatives is statutorily mandated.

4. The Necessity for Review

Petitioner argues that this Court's review is required because the judgement of the Ninth Circuit "invites employers and employees alike to evade their statutory tax obligations," a fact, according to petitioner, aggravated by a split in the circuits.

The figures quoted by petitioner at page 20 which show a 170% increase in the amount of tips reported during the precise time period that IRS National Office had a strict policy against employer-only assessments based on aggregate estimates of all employees (see fn. 3 supra) belies the suggestion that aggregate assessments are a critical enforcement tool in IRS's arsenal.

This position was reiterated in a memo dated June 16, 1998 from Tom Burger, Director, Office of Employment Tax Administration & Compliance (OETAC):

> . . . We wish to emphasize these policy procedures again. Any assessment made against the employer must mirror those first made against individual employees. . . . We have received congressional inquiries that employer-only assessments are still being performed by IRS examiners, although our current policy prevents this. Please insure that all affected IRS personnel working on the Tip Initiative follow the current procedures related to tip examinations.

While the decisions of other circuits are certainly in need of correction and clarification, such need does not warrant upsetting the sound judgement of the Ninth Circuit. The more prudent course is to wait the resolution of the cases currently pending in the First and Second Circuits involving the same issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 16, 2001

APPENDIX

1. 26 U.S.C. 45B provides, in relevant part:

(a) General rule. –

For purposes of section 38, the employer social security credit determined under this section for the taxable year is an amount equal to the excess employer social security tax paid or incurred by the taxpayer during the taxable year.

(b) Excess employer social security tax –

For purposes of this section –

(1) In general. –

The term 'excess employer social security tax' means any tax paid by an employer under section 3111 with respect to tips received by an employee during any month, to the extent such tips –

(A) are deemed to have been paid by the employer to the employee pursuant to section 3121(q) (without regard to whether such tips are reported under section 6053), and

(B) exceed the amount by which the wages (excluding tips) paid by the employer to the employee during such month are less than the total amount which would be payable (with respect to such employment) at the minimum wage rate applicable to such individual under section 6(a)(1) of the Fair Labor Standards Act of 1938 (determined without regard to section 3(m) of such Act).

(2) Only tips received for food and beverages taken into account. –

In applying paragraph (1), there shall be taken into account only tips received from customers in connection with the providing, delivering, or serving of food or beverages for consumption if the tipping of employees delivering or serving food or beverages by customers is customary.

(c) Denial of double benefit. –

No deduction shall be allowed under this chapter for any amount taken into account in determining the credit under this section.

(d) Election not to claim credit. –

This section shall not apply to a taxpayer for any taxable year if such taxpayer elects to have this section not apply for such taxable year."

* * *

2. 26 U.S.C. 3101 provides, in relevant part:

(a) Old-age, survivors, and disability insurance

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) –

In cases of wages received during:	The rate shall be:
1984, 1985, 1986, or 1987.....	5.7 percent
1988 or 1989.....	6.06 percent
1990 or thereafter.....	6.2 percent

(b) Hospital insurance

In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) –

(1) with respect to wages received during the calendar years 1974 through 1977, the rate shall be 0.90 percent;

(2) with respect to wages received during the calendar year 1978, the rate shall be 1.00 percent;

(3) with respect to wages received during the calendar years 1979 and 1980, the rate shall be 1.05 percent;

(4) with respect to wages received during the calendar years 1981 through 1984, the rate shall be 1.30 percent;

(5) with respect to wages received during the calendar year 1985, the rate shall be 1.35 percent; and

(6) with respect to wages received after December 31, 1985, the rate shall be 1.45 percent.

* * *

3. 26 U.S.C. 3102 provides, in relevant part:

Sec. 3102. Deduction of tax from wages

(a) Requirement

The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. . . . An

employer who in any calendar year pays to an employee cash remuneration to which paragraph (7)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than the applicable dollar threshold (as defined in section 3121(x) for such year; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (7)(C) or (10) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $100; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $150 and the employee has not performed agricultural labor for the employer on 20 days or more in the calendar year for cash remuneration computed on a time basis; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (12)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total

amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20.

(b) Indemnification of employer

Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(c) Special rule for tips

(1) In the case of tips which constitute wages, subsection (a) shall be applicable only to such tips as are included in a written statement furnished to the employer pursuant to section 6053(a), and only to the extent that collection can be made by the employer, at or after the time such statement is so furnished and before the close of the 10th day following the calendar month (or, if paragraph (3) applies, the 30th day following the year) in which the tips were deemed paid, by deducting the amount of the tax from such wages of the employee (excluding tips, but including funds turned over by the employee to the employer pursuant to paragraph (2)) as are under control of the employer.

* * *

4. 26 U.S.C. 3121(a)(12) provides, in relevant part:

Sec. 3121. Definitions . . .

(12)(A) tips paid in any medium other than cash;

(B) cash tips received by an employee in any calendar month in the course of his employment by an

employer unless the amount of such cash tips is $20 or more;

* * *

5. 26 U.S.C. 3121(b) provides, in relevant part:

(b) Employment

For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, . . .